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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. [redacted] 69

THE SHERWOOD DISTILLING COMPANY,
A CORPORATION, AND LOUIS MANN,
Petitioners,

VS.

PEOPLES FIRST NATIONAL BANK AND TRUST COMPANY, A CORPORATION,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioners, The Sherwood Distilling Company and Louis Mann, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Fourth Circuit, affirming a judgment for $694,600 entered against the Petitioners by the United States District Court for the District of Maryland.

JURISDICTION

Jurisdiction to review this case upon a Writ of Certiorari is conferred upon this Court by 28 U. S. C. Sec. 1254 (1).

The first opinion of the Court of Appeals for the Fourth Circuit (by Parker, C.J.) was filed on January 3, 1952

(R-AE. 75) *see Note (1) infra.* This first opinion was corrected upon that Court's denial of the Petitioners' Motion for a Rehearing on February 18, 1952 (R-AE. 108). A *per curiam* opinion was filed on February 18, 1952 (R-AE. 105) when the Motion for a Rehearing was denied, and an Order for Mandate was filed (R-AE. 108). The Mandate was issued on February 29, 1952 (R-AE. 108) and was received by the District Court on March 3, 1952.

OPINIONS BELOW

There is no formal opinion of the District Court, but that Court's charge to the jury is printed in the Record (R. 297-310). The District Court's rulings on the Requests for Instructions are also printed in the Record (R. 286-297).

The first Opinion of the Court of Appeals appears in 193 F. 2d 649 (R-AE. 75-86). The second Opinion of the Court of Appeals appears in 194 F. 2d 387 (R-AE. 105-107).

STATEMENT OF THE MATTER INVOLVED

This case involves one of the boldest frauds in recent years.

For many years, in connection with the financing of its operations, The Sherwood Distilling Company, one of the Petitioners (hereinafter called "Sherwood"), after its whiskey was distilled and Warehouse Receipts issued for that whiskey, would borrow money through loan brokers and pledge the Warehouse Receipts as collateral security for the loan (R. 130). These operational loans were for relatively small sums — apparently none exceeding $40,000.00 or $45,000.00 in amount.

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(1) The reference "(R. ..)" refers to Volume I of the Appellants' Appendix.

The reference "(R. II ..)" refers to Volume II (Book of Exhibits) of the Appellants' Appendix.

The reference "(R-AE. ..)" refers to the Appellee's Appendix and the proceedings in the Court of Appeals for the Fourth Circuit immediately following the Appellee's Appendix.

All of the Sherwood capital stock (980 shares) is owned by the other Petitioner, Louis Mann (hereinafter called "Mann"). Mann is President of Sherwood and actively directs its affairs.

Beginning in the year 1938, the Philadelphia Acceptance Corporation, a Pennsylvania corporation (hereinafter called "PAC") owned, operated and dominated by its President, Charles W. Collom, (hereinafter called "Collom") acted as loan broker for Sherwood (R. 131). In accordance with the general practice in these matters, notes were issued by Sherwood with interest at 6%, and these notes with accompanying Warehouse Receipts were placed with PAC. PAC then re-discounted these notes, usually at a smaller rate of interest — 3%, 4% or 5% — the difference in interest rate being PAC's compensation as broker in the transaction. As the notes matured from time to time, it was often necessary to place the maturing loan with two or more banks — dividing the amount of the loan among the other banks as they indicated the amount they would accept (R. 130).

The practice grew up — and it is a general practice — for Sherwood to send PAC forms of notes with blanks for the name of the payee, the date, the collateral to be pledged, signed by Sherwood and endorsed by Sherwood (R. 131). This was to enable PAC to allocate the amounts and the Warehouse Receipts to be pledged as collateral among the new lenders. When this was done, PAC would send Sherwood a monthly statement of account showing payments and rediscounts, as well as the month and interest due (R. 130-131). PAC also sent Sherwood a monthly note schedule showing the outstanding notes at the end of the calendar month (R. II 63-83). The Sherwood loans, as thus arranged, were placed by PAC with many banks in Pennsylvania, including the Respondent Bank (hereinafter called "Peoples Bank"). Some loans, however, were placed elsewhere

throughout the United States, from Connecticut to North Carolina and from Pennsylvania to California.

Peoples Bank had five of the operational loans as of January 1, 1949. These loans were for $20,000.00, $40,000.00, $40,000.00, $40,000.00 and $4,580.64, respectively, a total of $144,580.64. These loans were secured by bona fide Warehouse Receipts, in the usual form and issued from time to time by Sherwood as the whiskey was distilled and placed by Sherwood in United States Government Bonded Warehouses.

In April, 1949, Collom spoke to John W. Dupuis (hereinafter called "Dupuis"), Vice-President of Peoples Bank, about a proposed sale of the Sherwood capital stock and the entire Sherwood whiskey inventory, consisting of approximately 22,000 barrels of whiskey. He wrote Dupuis about the matter on May 6, 1949 (R. 74).

Collom was acting as broker for Mann and Sherwood for the *sale* of the Sherwood whiskey inventory and capital stock. He had arranged a Contract of Sale between Mann and Thomas J. Manley for the sale of the 980 shares of Sherwood capital stock and 21,337 barrels of whiskey. This Contract of Sale of June 10, 1949, briefly summarized, provided for the sale of the capital stock and whiskey inventory for $2,000,000.00 cash. From the $2,000,000.00 purchase price, the outstanding loans of Sherwood were to be paid off by Collom as Trustee and Escrow Agent (originally the Trustees and Escrow Agents were Mann and Collom; later by amendment Collom became the sole Trustee and Escrow Agent), the outstanding Warehouse Receipts were to be returned to Sherwood for cancellation and duplicate Warehouse Receipts were to be issued and delivered to the purchaser, upon payment of the $2,000,000.00. Although it would take a few days to consummate the transaction, it

was contemplated that the whole matter should be a substantially simultaneous transaction. The Fidelity-Philadelphia Trust Company of Philadelphia, Pennsylvania (hereinafter called "Fidelity-Philadelphia") was to act as custodian in the matter for Collom, the Trustee and Escrow Agent. Collom was to receive $50,000.00 as a brokerage commission. The $2,000,000.00 was required to be paid within three days after the execution of the Contract of Sale on June 10, 1949 (R. 141-145; R. II 35-46).

In order to be able to carry out the agreement, Mann, in a new Warehouse Receipt Book, made out duplicate Warehouse Receipts, *all dated June 14, 1949* for the entire Sherwood whiskey inventory of 21,337 barrels. The serial numbers of the barrels on the outstanding Receipts were placed on the unissued duplicate Receipts. These duplicate but unissued Warehouse Receipts were turned over by Mann to Collom as Trustee and Escrow Agent, together with the 980 shares of Sherwood stock, endorsed in blank, to be placed with the Custodian, Fidelity-Philadelphia, for the consummation of the Contract of June 10, 1949. Collom gave his receipt for the duplicate unissued Receipts and the capital stock.

The Contract of Sale of June 10, 1949, however, was not consummated. Manley did not pay the $2,000,000.00 on June 13, 1949 (R. 145).

Mann asked for the return of the capital stock and the unissued duplicate Receipts (R. 145). He cancelled, on the books of Sherwood, the unissued duplicate Receipts in the latter part of June, 1949 (R. 158).

Collom's Fraud and the Purported $800,000.00 Loan

During this period of June and July, 1949, unknown to Sherwood and Mann, Collom, who had lost large amounts

of money in speculative ventures, was desperate for money (R. 233). The unlawful and fraudulent scheme of Collom to defraud then took more definite shape in Collom's mind.

Collom had already indicated to Dupuis that Sherwood might need a loan in connection with the contemplated sale of the Sherwood stock and entire inventory (R. 74). In the latter part of July, 1949 Collom approached Dupuis for a large loan to Sherwood. Dupuis discussed a proposed loan to Sherwood of possibly $1,000,000.00 with Mr. Downie, the President of Peoples Bank (R. 266). Dupuis told Downie about the proposed sale and that Collom was acting as agent or broker for the sale (R. 266). Downie also knew in June, 1949 that the purchase price was $2,000,000.00 (R. 268-269).

Dupuis, however, had no authority to approve a loan in excess of $100,000.00 (R. 70). The power of approval of loans in excess of $100,000.00 was in the first instance in the Senior Loan Committee of Peoples Bank (R. 70).

On July 20, 1949, as disclosed by the minutes, Dupuis appeared before the Senior Loan Committee to obtain approval of *an application of Sherwood* for a loan of $1,000,000.00 at 6% for 90 days, to be secured by the stock and whiskey Receipts covering the inventory of Sherwood and stated that the note *would also be endorsed by Mann and PAC* (R. 67). The following day, July 21, 1949, as disclosed by the minutes, the Executive Committee of Peoples Bank approved a loan to *Sherwood* for $800,000.00. The action of the Executive Committee was approved by the Board of Directors of Peoples Bank by its minute of August 11, 1949 (R. 69). These written Minutes showing a direct loan to Sherwood, with Mann and PAC as accommodation endorsers, are the only Minutes in regard to the $800,000.00 transaction (R. 68).

As will be more fully pointed out in the Brief filed herewith, the District Court, over the objection of the Petitioners, permitted Dupuis (R. 70; 284-285) to testify that these written Minutes did not properly reflect the transaction which, he said, instead of being *a direct loan to Sherwood,* was a rediscounted loan for PAC, although the full interest rate of 6% was charged by the bank on the loan. This was to attempt to establish the bank as a holder in due course, of the purported $800,000.00 note.

Dupuis, however, testified that he made the purported $800,000.00 loan in accordance with the authorization set forth in the minutes (R. 72).

Collom, on June 20, 1949, had telephoned Mann to send two blank notes to take care of replacements for the entire collateral held by all banks, and on the same day Mann forwarded Collom the two blank notes, asking that the usual copy be returned in accordance with the usual practice. At that time, the total outstanding loans of Sherwood in the hands of the banks, including Peoples Bank, amounted to $497,697.27 (R. II 63).

As already pointed out, Mann had cancelled, in the latter part of June, 1949, on the Sherwood Receipt Books, the unissued and duplicate Certificates dated June 14, 1949 and had demanded their return, as well as the return of the capital stock. Mann believed that both the stock and the cancelled Warehouse Receipts were in the hands of the Custodian, Fidelity-Philadelphia (R. 153-154). Unknown to Mann, Collom either forged Mann's name to a blank note or used one of the blank notes forwarded on July 20, 1949 and filed in blanks without Mann's authority or knowledge (R. 137, 149, 227, 228, 229; R. II, 63). Assuming, without conceding, that the purported $800,000.00 note, which

was never produced and offered by Peoples Bank, was in the same general form as the purported $694,600.00 note in suit, Collom filled in the amount — $800,000.00, the number of the note, *AS* — 124, the date, July 21, 1949, the payee "ourselves" and then apparently listed not the collateral held by the banks — the bona fide warehouse receipts — but the cancelled unissued duplicate Warehouse Receipts, all dated June 14, 1949, which he had not yet returned to Sherwood. The numbers of the Warehouse Receipts, the number of barrels, the serial numbers of the whiskey barrels themselves, the date of inspection, the number of the United States Government Bonded Warehouse and the number of gallons were listed as collateral. The number of barrels, the numbers of the Warehouse Receipts, the date of inspection, the number of the Warehouse and the number of gallons were the same as those identical numbers appearing on the much larger number of original bona fide Warehouse Receipts in the hands of the banks for legitimate loans. There was a second sheet of paper accompanying the note and apparently attached by a staple, listing much of the purported collateral (R. II 3-4). This second sheet of paper is entirely unsigned and unidentified in the purported note which was signed and filled in. The 980 shares of capital stock of Sherwood, however, were not listed as part of the collateral pledged (R. II 1-6).

The District Court over the objection of Sherwood and Mann, permitted secondary evidence as to the signatures and terms of the purported $800,000 note, although the evidence showed that when last seen it was in the files of PAC (R. 41, 254-256). Counsel for the Trustee in Bankruptcy of PAC *stated* that he had caused a search to be made, but no one who made the search was produced, nor was there evidence of the nature of the search.

With this purported $800,000 note, Collom placed the unissued duplicate Warehouse Receipts and delivered the purported note and duplicate Warehouse Receipts to Fidelity-Philadelphia with a draft for $788,000.00 ($800,000.00 less $12,000.00, interest at 6% for 3 months). Fidelity-Philadelphia, which was acting as the agent for Peoples Bank in this matter, made out a safekeeping receipt, listing the collateral but omitting the *date of June 14, 1949 appearing on all of the duplicate Warehouse Receipts.* Fidelity- Philadelphia sent off the draft of July 21, 1949 with this safekeeping receipt to Peoples Bank. The draft was accepted by Peoples Bank. The entire proceeds, $788,000.00, were transferred *to the account of PAC* at Fidelity-Philadelphia and were immediately used by PAC to cover approximately $300,000.00 in overdrafts of PAC and to pay the $144,580.64 check which PAC had given to Fidelity-Philadelphia to pay off the Sherwood note which Peoples Bank had already been carrying (R. 231, 233). Dupuis received the safekeeping receipt of Fidelity-Philadelphia on July 22, 1949 (R. 244). Later he received the 980 shares of Sherwood stock, together with a *copy* of a purported telegram dated July 21, 1949 from Mann to Collom stating that Collom was authorized to pledge the shares "as *additional* collateral with Peoples First National Bank, Pittsburgh. Letter will follow" (R. 33). This purported telegram was never actually sent by Mann at all, who was in Westminster on that day and not in Atlantic City (R. 156). This telegram was either sent by Collom or by someone for Collom from Atlantic City during Mann's absence. No letter, of course, from Mann ever did "follow" (R. 76). The District Court, over the Petitioners' objection, permitted this purported copy to be admitted into evidence in the absence of the original or any explanation why the original was not available (R. 33).

PAC's check for $144,580.64 was received by Peoples Bank on July 21 or 22, 1949 (R. 104). It was not until three or four days later, July 25, that the five notes, aggregating $144,-580.64, were returned to PAC (R. 243). It is apparent that for four days, Fidelity-Philadelphia had the duplicate Receipts, all dated June 14, 1949, and for three days Peoples Bank had the safekeeping receipt showing the serial numbers of the barrels of whiskey in its possession *at the same time* it held the five bona fide notes for $144,580.64 listing the same serial numbers of barrels of whiskey which appeared upon the bona fide Warehouse Receipts and also upon the duplicate Warehouse Receipts of June 14, 1949.

It is conceded and the Trial Court instructed the jury that neither Mann nor Sherwood got any of the proceeds of the purported $800,000.00 loan (R. 302, 231).

Although Collom had indicated that this fraudulent note would be paid off substantially before the due date, this was not done. Collom or PAC did pay on account of the note $105,400.00 (R. II 33) (probably out of the proceeds of the original purported loan).

By September, 1949, however, the purported sale had not gone through and Dupuis sent Marguglio, an employee of Peoples Bank, to see Collom. Mr. Marguglio's written report of that meeting appears in the Record (R. 78-79) and shows that a copy of the Sale Agreement dated June 10, 1949 was presented to Mr. Marguglio for perusal.

During this period, PAC was sending Sherwood monthly statements of outstanding notes (R. II 63). The purported $800,000.00 note did not appear among the list of notes. During the same period, Mann, who had made arrangements with the Union Trust Company of Maryland (Baltimore, Maryland) and the Equitable Trust Company (Baltimore, Maryland) to take over the loans, was paying off during this

period the outstanding legitimate loans (R. 165, 166). In August or September, 1949, Sherwood paid $118,000.00 through the Equitable Trust Company and $76,256.50 through the Union Trust Company for the payment of original bona fide outstanding notes which were returned with the original bona fide collateral by Collom upon these payments. Mann was becoming more insistent that the stock and duplicate Warehouse Receipts already cancelled by him on the Sherwood Books be returned to him (R. 145, 149).

The New Note Dated October 19, 1949, For $694,600.00

The purported $800,000.00 note fell due on October 19, 1949. Neither Sherwood nor Mann were notified of the fact that the note was due (R. 101). Collom had requested Peoples Bank to accept a new note for $694,600.00 when the original note fell due. Dupuis agreed to oblige him (R. 87). Collom, using the blank note which he had in his possession but which did not bear the personal endorsement of Mann, filled in, without Mann's knowledge, consent or authority, a new note for $694,600.00 (R. 149, 170). He typed in the amount, $694,600.00, the number — *AS* 125, the date, October 19, 1949, the words "On Demand", the word, "we" before "promise to pay", the payee, "ourselves" and the amount in writing, $694,600.00, and apparently listed the same collateral with the new duplicate Receipt numbers except the purported collateral which had been withdrawn upon the payment of the $105,400.00. Collom also attached an unsigned second sheet of paper purporting to list much of the collateral (R. II 3-4).

Fidelity-Philadelphia, which was acting for Peoples Bank in the transaction, observed that there was no individual endorsement by Mann and called this to Collom's atten-

tion. It also wrote its principal, Peoples Bank, advising it of the situation (R. 87-88).

In the meantime, Collom had telephoned Mann that he needed an additional blank note with his personal endorsement as one of the banks was complaining that the note did not have this endorsement (R. 169). On October 26, 1949, Mann sent off a blank note containing his individual endorsement (R. 169). In the meantime, Fidelity-Philadelphia was holding the first purported note for $694,600.00 until a new note was received. Fidelity-Philadelphia wrote Peoples Bank on October 28, 1949, that "This note is now being typed" (R. 88-89) and Miles S. Altemose, Vice-President of Fidelity-Philadelphia, testified that the note had been endorsed but had not yet been prepared and that this was the advice his bank was giving its principal, Peoples Bank (R. 27). In other words, both Fidelity-Philadelphia and Peoples Bank knew that the purported $694,600.00 note *had been executed in blank.*

Nothing was paid by Collom or PAC on the $694,600.00 note except Collom paid the interest on the note for 31 days on November 22, 1949, in the amount of $3,588.76 (R. 90).

On February 14, 1950, Dupuis wrote to Fidelity-Philadelphia enclosing the purported $694,600.00 note for collection and stated that if it were not paid on February 15, 1950, it was authorized by Peoples Bank to redraft the note and collateral and present it by messenger, either to Equitable Trust Company in Baltimore or the Manufacturers Trust Company in New York City (R. 93). Fidelity-Philadelphia presented the draft, the note and the Warehouse Receipts to Manufacturers Trust Company but payment was refused (R. 94). Fidelity-Philadelphia advised Peoples Bank that it had presented the draft to PAC for payment and had been instructed to redraft on the Manufacturers Trust Company.

On February 23, 1950, Fidelity-Philadelphia advised Peoples Bank that payment had been refused and the note and Warehouse Receipts returned (R. 95). The note was not protested at the time nor was there any communication to Sherwood or Mann in regard to the matter (R. 101).

Thereafter there were communications between Collom and Dupuis in regard to the payment of the note. On May 31, 1950, Dupuis wrote Collom that it would be desirable to obtain a new note, pointing out that there was a discrepancy between the collateral as itemized and summarized and that there was no hypothecation agreement signed by Mann in regard to the 980 shares. Dupuis also pointed out that the fire insurance policy on the whiskey had not been delivered to Peoples Bank (R. 98-99; R. II 29-31).

Finally on July 21, 1950, Dupuis presented the note again for payment and communicated *for the first time* during the entire transaction with Sherwood (R. 101). Mann received a telegram from Peoples Bank and immediately telegraphed that bank that Sherwood and Mann did not owe any such amount and failed to understand how the bank came into possession of the note and collateral (R. 121). This telegram was followed by a letter denying liability and stating that Peoples Bank would be held accountable for any sale of any purported collateral.

There were later conferences between interested parties during which the entire fraud of Collom was discovered. In the first part of August, 1950, PAC filed a Voluntary Petition in Bankruptcy in the United States District Court for the Eastern District of Pennsylvania. Peoples Bank has proved a claim of some $700,000.00 against PAC in that proceeding (R. 242).

On August 2, 1950, Peoples Bank filed suit against Sherwood and Mann and against the Union Trust Company, in

the United States District Court for the District of Maryland. The jurisdiction of the Court was based upon diversity of citizenship. The Complaint alleged the purported execution of the $800,000.00 note and a renewal note of $694,600.00. In the Complaint, it is further alleged that the Union Trust Company had loans which purport to be secured by Warehouse Receipts covering the same whiskey as appeared in the Warehouse Receipts pledged with the Plaintiff.

The case was tried before a jury and requests for instructions of Sherwood and Mann were submitted to the Trial Judge (Coleman, C.J.) on March 14, 1951, the day before the Charge and were argued at that time (R. 3, 287). The Trial Court indicated what its Instructions would be at that time (R. 287-297). The following day, however, the Trial Court charged the jury (R. 297-310) but did not charge the jury in a number of respects as the Trial Court had indicated to Counsel on the preceding day. The Trial Court refused the Petitioner's Requests for Instructions except as embodied in the Court's charge, and these exceptions were renewed by the Petitioners at the conclusion of the Charge (R. 310).

The jury found a general verdict for the Plaintiff (Peoples Bank) and assessed the damages at $694,600.00 "plus interest at 6% to date" (R. 312). The jury did not calculate the interest and add it to the principal sum and render a lump sum verdict in accordance with the usual practice. Counsel for the Petitioners requested that the jury be polled, and this was done. When the jury hearkened to its verdict, the verdict was for the Plaintiff generally and in the amount of $694,*000*.00—$600.00 less than the foreman had announced—"plus interest at 6% to date" (R. 313). As originally recorded on the Civil Docket, the verdict and Judgment was entered

in favor of the Plaintiff against the Defendants for $694,600.-00, plus interest at 6% from *June* 25, 1950, and costs of suit. *Later* the names, "The Sherwood Distilling Company" and "Louis Mann" were inserted by the Clerk (and subsequently approved by the Trial Judge) in the Civil Docket, but no disposition was made as to the Union Trust Company, the other Defendant (R. 3, 337). Still later, the word "June", by instructions of the Trial Judge, was changed to "*July*", although the Trial Judge had said to the jury, after recordation of the verdict, that the instructions were that any interest allowed would be from *June* 25, 1950, to this date (R. 337).

The Petitioner filed a Motion for a Judgment Non Obstante Veredicto, or in the alternative, for a New Trial, setting out the various errors committed during the trial of the case (R. 320-329). This Motion was overruled by the District Court (R. 341).

The Petitioners, in due course, perfected an Appeal to the Court of Appeals for the Fourth Circuit. The Judgment was affirmed by that Court (R-AE. 87).

QUESTIONS PRESENTED

1. May a national bank introduce parol evidence contrary to its duly recorded Minutes in order to change the entire nature of a loan made by it?

2. If parol evidence is admissible by a national bank to contradict its duly recorded minutes in order to change the entire nature of a loan made by it, may the District Court disregard the Minutes and withdraw from the jury the question of whether or not the written Minutes or the oral testimony present the correct version of the transaction?

3. If the duly recorded Minutes of the national bank control the nature of the transaction, and it appears that the suit is between the original parties to the transaction and the uncontradicted evidence establishes that the maker of the note received no part of the proceeds of the note, was the District Court required to direct a verdict in favor of the maker and the accommodation endorser?

4. Did the District Court err in permitting a copy of a purported telegram of July 21, 1949 to be introduced into evidence when there was no showing why the original telegram could not be produced?

5. It having been established that the title of PAC to the note was defective, pursuant to Section 55 of the Uniform Negotiable Instruments Act, was it error for the District Court to refuse to instruct the jury to the effect that there was a defective title and that the burden of proof was upon the Peoples Bank to prove that it acquired title as a holder in due course, pursuant to Section 59 of the Uniform Negotiable Instruments Act?

6. Should the District Court have directed the verdict for Sherwood and Mann, as the Peoples Bank either had actual knowledge of Collom's lack of authority or was put upon inquiry so that Peoples Bank having failed to make inquiry which would have established the lack of authority, was guilty of bad faith?

7. Is Peoples Bank charged with knowledge of relevant facts in regard to the transaction possessed by its Agent, Fidelity-Philadelphia, and if so, do these facts make Peoples Bank guilty of bad faith in accepting the loan?

8. Is the failure of the Trial Judge to instruct the jury in accordance with the Sixteenth Request for Instructions by the Petitioners which sets out the factual elements from

which the jury could find bad faith on the part of Peoples Bank (R. 318), which the Trial Judge at the argument in regard to the Requests for Instructions had indicated he would instruct the jury (R. 289), but which in the actual Charge, he did not instruct the jury (R. 297-310), result in prejudicial error to the Petitioners?

9. Is the Trial Judge's failure to instruct the jury that delay in attempting to collect the purported original note for $800,000.00 and the purported renewal note of $694,-600.00 was evidence of a want of a valid claim by Peoples Bank, as prayed in the Fifteenth Request for Instructions of Sherwood and Mann (R. 318), and which the District Judge indicated he would instruct the jury (R. 289), but failed to do so, result in error prejudicial to the Petitioners?

10. Did the Court of Appeals for the Fourth Circuit err in holding that the doctrine of "two innocent persons" applied in the case at bar, notwithstanding Section 14 of the Uniform Negotiable Instruments Act?

11. Did the Court of Appeals for the Fourth Circuit err in holding that the $800,000.00 note was "negotiated"?

12. Did the Court of Appeals err in stating that the Trial Judge should have directed the verdict for the Plaintiff?

13. Did the District Court err in instructing the jury that to find bad faith on the part of Peoples Bank, it was necessary to find that the Bank's conduct was "substantially equivalent to fraud" and that it was necessary to find that "the Plaintiff Bank was dishonest, namely, did it let PAC have the money on the note, knowing and believing that PAC did not have authority to negotiate the note, or that PAC would use its proceeds, or some of its proceeds, for PAC's own purposes * * *"?

14. Did the District Court err in permitting secondary evidence in regard to the signatures upon and the terms of the purported $800,000.00 note without a proper foundation having been laid by showing a proper search for the original purported $800,000.00 note?

15. Did the District Court err in making two changes in the jury's verdict after the jury had been polled and discharged?

REASONS FOR ALLOWANCE OF THE WRIT

I. The Court of Appeals for the Fourth Circuit has rendered a Decision in conflict with the Decisions of other Circuit Courts of Appeals in the same matter.

A. In holding that parol evidence is admissible to contradict the duly recorded written Minutes of the Peoples Bank and in holding that the parol evidence as a matter of *law* supersedes the written Minutes.

The Court of Appeals for the Fourth Circuit stated:

> "* * * Evidence as to what took place as to the negotiation of the note was not to be excluded merely because the Bank's minutes authorized a loan to the Distilling Company rather than a discount of its paper. We know of no principle by which a corporation may be held estopped from showing the true nature of a transaction because of entries made in the minutes of its committees."

It is submitted that the question is not one of "estoppel," but one involving the parol evidence rule. This decision is in conflict with a strong *dictum* of Mr. Justice Holmes speaking for this Court in *Denver and Rio Grande Railroad Co. v. Arizona and Colorado Railroad Company*, 233 U. S. 601, 58 L. Ed. 1111 (1914—Holmes, J.) and is in conflict with the decisions of the First, Second, and extraordi-

narily enough, the Fourth Circuit, as will be seen by the examination of the following cases:

1. First Circuit — *American and British Manufacturing Corporation v. New Idria Quicksilver Mining Company*, 293 F. 509, 523-24 (CCA1-1923);
2. Second Circuit — *Indian Refining Company v. Buhrman*, 220 F. 426 (CCA2-1915);
3. Fourth Circuit — *Duffy v. Treide*, 175 F. 2d 17 (CCA4-1935).

B. In holding that the purported $800,000 note was "negotiated" even though Peoples Bank be considered the payee of the note.

This holding is contrary to the decision of the Court of Appeals for the District of Columbia in *Washington Loan and Trust Company v. Cowgill*, 85 F. 2d 255.

II. The Court of Appeals for the Fourth Circuit has decided important questions of local law in a way in conflict with applicable local decisions.

A. In regard to the admissibility of a copy of the purported telegram of July 21, 1949 without explanation of why the original telegram was not available, its decision is in direct conflict with the case of *Smith v. Easton*, 54 Md. 138 (Court of Appeals of Maryland — 1880).

B. In regard to admitting secondary evidence in regard to the signatures upon and the terms of the purported $800,000.00 note, without laying a proper foundation by showing a proper search for the original, its decision is in conflict with the cases of *Glenn v. Rogers*, 3 Md. 312 (Court of Appeals of Maryland — 1852); *Bartlett v. Wilbur*, 53 Md. 485 (Court of Appeals of Maryland — 1880).

III. The Court of Appeals for the Fourth Circuit has misconstrued and misapplied several important provisions of the Uniform Negotiable Instruments Act.

The Uniform Negotiable Instruments Act has for a number of years been adopted in all of the forty-eight states and in Alaska; Hawaii, Phillippine Islands, Puerto Rico, and the District of Columbia. Its scope is national and its importance is national. This Court as the highest Court in the nation should stabilize and clarify the law in regard to this statute of national application and importance.

A. The Court of Appeals labored under the misconception that the Common Law Rule "that where two innocent persons must suffer from the wrongful act of a third party, he who has put it within the power of the third person to commit the wrong must suffer the loss", was incorporated in the Uniform Negotiable Instruments Act in its full vigor. The Court of Appeals has overlooked the *change* in the Common Law Rule incorporated in Section 14 of the Uniform Negotiable Instruments Act in regard to *blanks*. The change in the Common Law Rule was "In order, however, that any such instrument when completed may be enforced against any party thereto, prior to its completion, it must be filled up strictly in accordance with the authority given, and within a reasonable time", but a holder in due course may enforce the instrument as if it had been filled up strictly in accordance with authority given and within a reasonable time. The Court of Appeals is in error in stating that it is immaterial whether Peoples Bank was a holder in due course because of the Common Law Rule. The decision of the Court of Appeals is to repeal, pro tanto, the clear provisions of Paragraph 14

of the Uniform Negotiable Instruments Act. This error should be corrected by this Court.

B. The Court of Appeals indicates that knowledge of the fact that the paper was issued by the maker in blank is not sufficient to deprive the taker of his position as a holder in due course. The authorities are quite to the contrary. This Court should correct this error.

C. The Court of Appeals indicates that the District Court should have directed a verdict for the Plaintiff.

This is contrary to the decision of the Court of Appeals for the Fourth Circuit, itself in the case of *Commercial Trust Company v. Kealey,* 92 F. 2d 397 (Soper, Ct. J., Parker, Ct. J., dissenting) which properly held that where it was shown that the title of any person who negotiated the instrument was defective, the burden was on the holder to prove that he acquired the title as a holder in due course as provided in Section 59 of the Uniform Negotiable Instruments Act, and that the case was properly submitted to the jury. This Court should correct this error.

D. The Court of Appeals approved an instruction by the District Court that to find bad faith on the part of Peoples Bank, it was necessary to find that the Bank's conduct was "substantially equivalent to fraud," and that it was necessary to find that "the Plaintiff Bank was dishonest, namely, did it let PAC have the money on the note, knowing or believing that PAC did not have authority to negotiate the note, or that PAC would use its proceeds, or some of its proceeds, for PAC's own purposes * * *" (R. 306).

This is far too heavy a burden upon the maker and endorser and if it stands as the law, will make it practically impossible, *ever* to show bad faith on the part of any banking institution or a holder of a negotiable instrument. The

authorities do not support this conclusion and it is important that this error be corrected by this Court in order to protect defrauded persons.

IV. The Court of Appeals has sanctioned such a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. In regard to the District Court's announcement of its proposed instructions to the jury the day before the argument of the case and the charge to the jury, and the failure of the District Court to charge the jury as previously indicated.

Written Requests for Instructions were submitted by both parties to the District Court prior to argument by counsel and to the Court's Charge to the Jury. After substantial argument, the Trial Judge indicated how he would rule on these Requests for Instructions. Counsel for the Petitioners argued the case in conformity with the Trial Court's indication of how it would instruct the jury, but in the actual Charge to the jury the District Court did not instruct the jury as indicated.

This failure was of great prejudice to the Petitioners and departs from the usual and accepted method of instruction of the jury in the Federal Courts. It is a procedure which is not in accordance with due process of law and which resulted in substantial injury to the Petitioners. This Court's supervisory power should be invoked to disapprove of this procedure.

B. In regard to the two changes in the jury's verdict after the jury had been polled, the verdict agreed to as originally rendered and the jury discharged.

(1) It is submitted that the only way in which the Union Trust Company of Maryland, one of the Defendants, could

be eliminated from the case was either by dismissing the case as to it upon an appropriate Motion prior to the presentation of the case to the jury *or* after the case was submitted to the jury, by an instruction from the District Court that the jury find a verdict in favor of the Union Trust Company of Maryland. Neither procedure was adopted, and the verdict was a general verdict in favor of the Plaintiff. After the original recordation of the verdict and judgment, the words "against the Sherwood Distilling Company and Louis Mann" were inserted by the Clerk by interlineation. This action by the Clerk was later approved by the District Court. The Trial Court did not follow the proper procedure in this matter, and the supervisory power of this Court should be invoked.

(2) In regard to changing the date on which interest was to run from "June" to "July", the District Court informed the foreman of the jury subsequent to the time the jury was polled as to the beginning date for the running of interest. The foreman adopted the Trial Court's statement that June 21, 1950 was the proper date. The other members of the jury were not polled as to whether they concurred in the foreman's opinion and the jury was thereafter discharged. After the entry by the Clerk of the judgment, the District Court in addition to approving the insertion of the names of Sherwood and Mann as the persons against whom the judgment ran, directed the Clerk to strike out the word "June" and insert the word "July."

It is submitted that the District Court had no right to make these changes in the jury's verdict, and if there was error in the verdict and judgment — as there was — the Court should have granted the Petitioners' Motion for a New Trial or for Judgment Notwithstanding the Verdict. These errors justify the exercise of this Court's supervisory power.

WHEREFORE your Petitioners pray that a Writ of Certiorari be issued out of and under the Seal of this Court, directed to the United States Court of Appeals for the Fourth Circuit sitting at Richmond, Virginia, commanding that Court to certify and to send to this Court, on a day certain to be therein named, a full and complete Transcript of the Record and all proceedings had in this case, numbered and entitled on its Docket No. 6348, to the end that this case may be reviewed and determined by this Court; that the said Judgment of the United States Court of Appeals for the Fourth Circuit may be reversed by this Court; and that your Petitioners may have such other and further relief in the premises as may seem just and proper.

AND as in duty bound, your Petitioners will ever pray.

THE SHERWOOD DISTILLING COMPANY
and LOUIS MANN,
Petitioners.

By WILLIAM HOFFENBERG,

WILSON K. BARNES,
Attorneys for the Petitioners.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The references to the Opinions Below are set forth in the Petition, at Page 2 thereof.

JURISDICTION

The grounds on which the jurisdiction of this Court is invoked are set forth in the Petition, at Page 1 thereof.

STATEMENT OF THE CASE

Statement of the case appears in the Petition, at Pages 2-15, and in the interest of brevity is not repeated here.

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals for the Fourth Circuit erred:

1. In holding that a national bank may introduce parol evidence, contrary to its duly recorded written minutes in order to change the entire nature of a loan made by it.

2. In holding that the District Court could disregard the duly recorded written minutes of a national bank and withdraw from the jury the question of whether or not the minutes or the oral testimony present the correct version of the transaction.

3. In holding that the District Court was not required to direct the verdict for Sherwood and Mann as maker and accommodation endorser respectively even though it appeared from the recorded written minutes of the national bank that the suit was between the original parties to the transaction and the uncontradicted evidence established that neither Sherwood nor Mann received any part of the

proceeds of the note, which proceeds were delivered to PAC, another accommodation endorser.

4. In holding that the District Court was correct in permitting a copy of a purported telegram of July 21, 1949, to be introduced into evidence when there was no showing why the original telegram could not be produced.

5. In holding that the District Court was correct in refusing to instruct the jury to the effect that PAC's title to the note was defective, pursuant to Sec. 55 of the Uniform Negotiable Instruments Act, and that the burden of proof was upon Peoples Bank to prove that it acquired title as a holder in due course, pursuant to Sec. 59 of that Act.

6. In holding that the District Court was correct in not directing the verdict for Sherwood and Mann, although it appeared that Peoples Bank either had actual knowledge of Collom's lack of authority or was put on inquiry so that Peoples Bank, having failed to make inquiry which would have established the lack of authority, was guilty of bad faith.

7. In holding that Peoples Bank was not charged with knowledge of relevant facts in regard to the transaction possessed by its Agent, Fidelity-Philadelphia, and that those relevant facts did not make Peoples Bank guilty of bad faith in accepting the loan.

8. In holding that the District Court was correct in declining to instruct the jury in accordance with the Sixteenth Request for Instructions which set out the factual elements, from which the jury could have found bad faith on the part of the Peoples Bank even though the District Court at the argument in regard to the Requests for Instructions had indicated it would instruct the jury as set forth in the Sixteenth Request for Instructions but which, in the Charge, it did not instruct the jury.

9. In holding that the District Court was correct in failing to instruct the jury that delay in attempting to collect the purported original note for $800,000.00 and the purported renewal note of $694,600.00 was evidence of want of a valid claim by Peoples Bank, as requested in the Fifteenth Request for Instructions of Sherwood and Mann even though the District Court had indicated at the argument in regard to the Instructions that it would thus instruct the jury but failed to do so in the Charge.

10. In holding that the doctrine of "two innocent persons" applied in the case at bar, notwithstanding Sec. 14 of the Uniform Negotiable Instruments Act.

11. In holding that the $800,000.00 note was "negotiated".

12. In stating that the District Court should have directed the verdict for Peoples Bank.

13. In holding that the District Court properly instructed the jury that to find bad faith on the part of Peoples Bank, it was necessary to find that the Bank's conduct was "substantially equivalent to fraud" and that it was necessary to find that "the Peoples Bank was dishonest, namely, did it let PAC have the money on the note, knowing and believing that PAC did not have authority to negotiate the note, or that PAC would use its proceeds, or some of its proceeds, for PAC's own purposes * * *."

14. In holding that secondary evidence in regard to the signatures upon and the terms of the purported $800,000.00 note was admissible without a proper foundation having been laid by showing a proper search for the original purported $800,000.00 note.

15. In holding that the District Court acted properly in approving a change made by the Clerk on the Docket subsequent to the recordation of the general verdict and Judg-

ment by inserting the words, "The Sherwood Distilling Company and Louis Mann", and by changing the word "June" to "July" after the jury had been polled and discharged.

STATUTES INVOLVED

Pertinent provisions of the Uniform Negotiable Instruments Act (which is in force in both Maryland and Pennsylvania) are set forth at the end of this Brief.

ARGUMENT

I.

A national bank may not introduce parol evidence contrary to its duly recorded minutes in order to change the entire nature of a loan made by it; in any event the District Court may not disregard the minutes and withdraw from the jury the question of whether or not the minutes or the oral testimony present the correct version of the transaction; the duly recorded minutes control the nature of the transaction and the minutes show that the suit is between the original parties to the transaction, so that the District Court was required to direct a verdict in favor of Sherwood and Mann, the maker and accommodation endorser, the uncontradicted evidence establishing that neither Sherwood nor Mann received any part of the proceeds of the note.

(Specifications of Errors Nos. 1, 2 & 3)

Dupuis was not authorized to approve a loan on behalf of Peoples Bank in excess of $100,000.00. Only the Senior Loan Committee, with the approval of the Executive Committee, could approve a loan for $800,000.00 (R. 70).

On July 20, 1949, the Senior Loan Committee passed the following resolution:

> "Mr. Dupuis presented *the application of the Sherwood Distilling Corporation* for a loan of one million

dollars at 6% for ninety days to be secured by all the stocks of the Sherwood Distilling Corporation and warehouse receipts covering all its inventory (inventory has a market value of approximately $1,359,000). The note will *also* be endorsed by Louis Mann and the Philadelphia Acceptance Corporation. Approved." (R. 67). (Emphasis supplied.)

The following day, July 21, 1949, the Executive Committee passed the following resolution, which appears in its minutes:

"The decision of *The Sherwood Distilling Company* to liquidate *its* inventory of $1,350,000 was reviewed. Pending the sale of its 21,000 barrels of whiskey through a reliable broker, *the company* wishes to borrow $800,000 for ninety days at six per cent *with the endorsement of the Philadelphia Acceptance Corporation and Mr. Louis J. Mann*, the owner of the distillery, secured by negotiable United States bond and warehouse receipts for malt and other whiskey, as well as all the capital stock of The Sherwood Distilling Company. The malt included in the inventory has been sold and by next week the loan will be down to approximately $600,000. Upon motion duly seconded, unanimously approved." (R. 68). (Emphasis supplied.)

On August 11, 1949, the Board of Directors approved the action of the Executive Committee, and on the summary sheet of the minutes of the Executive Committee, approved by the Board of Directors, appeared the following:

"*Sherwood Distilling Company.* $800,000.00. Secured" (R. 69). (Emphasis supplied.)

It is readily seen that these minutes show that the loan of $800,000.00 was authorized to the *Sherwood Distilling Company* upon a pledge of all of the capital stock of that company and all of the inventory of that company. Upon the note purporting to evidence the debt, PAC and Mann were

to be *endorsers.* The interest rate was to be the full legal rate of 6%. There was no authorization by either the Senior Loan Committee, the Executive Committee or the Board of Directors to "rediscount" any loan for PAC but they only authorized a direct loan to Sherwood. Dupuis was asked specifically whether the $800,000.00 loan was made pursant to that authorization. The evidence is: Q. Mr. Dupuis, pursuant to this authorization you made this loan of $800,000.00, did you not? A. Yes, sir" (R. 72). The Witness, Dupuis, attempted to testify that the loan, although authorized as a direct loan to Sherwood was a "rediscounted" note for PAC (R. 70-71). Timely objections and motions to strike out this inadmissible testimony were made (R. 70, 284-285).

This is an exceedingly important matter to the Petitioners as the District Court instructed the jury that the note was a negotiable instrument and that Peoples Bank was a holder in due course, unless the jury found that Peoples Bank was guilty of bad faith amounting to fraud and dishonestly in accepting the note from PAC. The District Court held, *as a matter of law,* that the oral testimony of Dupuis set forth the correct transaction rather than the written minutes of the national bank. This error was concurred in by the Court of Appeals which stated, "* * * Certainly evidence as to what took place in the negotiation of the note was not to be excluded merely because the bank's minutes authorized a loan to the Distilling Company rather than a discount of its paper. We know of no principle upon which a corporation may be held estopped from showing the true nature of a transaction because of entries made in the minutes of its committees." 193 F. 2d 649, at 655 (R-AE. 86). The Court of Appeals cites no authority for this extraordinary holding. All of the authority seems to be to the contrary. This holding is contrary to a strong *dictum* of Mr. Justice Holmes, speaking for this Court and to decisions of

the First and Second Circuits (as well as of the Fourth Circuit itself). These contrary decisions are as follows:

A strong *dictum* of this Court: *Denver & Rio Grande Railroad Company v. Arizona and Colorado Railroad Company*, 233 U. S. 601, 58 L. 2d 1111 (1914 — Holmes, J.);

First Circuit: *American and British Manufacturing Company v. New Idria Quick Silver Mining Company*, 293 F. 509 (1923);

Second Circuit: *Indian Refining Company v. Buhrman*, 220 F. 426 (1915);

Fourth Circuit: *Duffy v. Treide*, 75 F. 2d 17 (1935).

The question is not one of "estoppel" as suggested by the first Opinion of the Court of Appeals for the Fourth Circuit but is a question of parol evidence, that is, whether the solemn written minutes of the bank, made contemporaneously with the transaction, can, after litigation develops, be *contradicted* by the oral testimony of an employee showing an entirely different transaction. Almost more shocking than the admission of the oral testimony is the ruling by both the District Court and the Court of Appeals that the *oral testimony conclusively establishes the nature of the transaction*, and it was not left to the jury to determine whether the written evidence or the oral evidence established the question of fact. A diligent search has disclosed no adjudicated case which establishes the *doctrine that oral testimony prevails over written testimony on the same subject matter as a matter of law.*

If the decision of the Court of Appeals for the Fourth Circuit stands in regard to this matter, it is not difficult to see the chaos in corporate matters which will inevitably result. No creditor, no stockholder and no person having

dealings with a corporation could have any confidence whatever in the minutes recording the formal decisions of the corporation, as these minutes would be open constantly to challenge by the oral testimony of any employee of the corporation whenever it suited the exigencies of the case.

The fact that the Respondent Corporation involved in this case is a national bank emphasizes the importance of having this erroneous doctrine of law corrected, and the Court of Appeals for the Fourth Circuit reversed. The national banks, by virtue of 12 U. S. C. A., Sec. 16, are required to make reports to the Comptroller of the Currency. The financial security of the people of the United States depends upon the accuracy and good faith of the records of the banks of the Country. If the minutes of the banks are to be challenged at the whim and caprice of subordinate officials of the bank by oral testimony, neither the Bank Examiners, nor the Comptroller of the Currency, nor the depositors, nor the stockholders can really know what the financial situation is in any of the banks of the United States.

This decision by the District Court, and concurred in by the Court of Appeals for the Fourth Circuit, is so erroneous and dangerous to the public welfare that this Court should reverse that decision.

II.

It was error to permit a copy of a purported telegram of July 21, 1949 to be introduced into evidence, and there was no showing why the original telegram could not be produced.

(Specifications of Error No. 4)

Peoples Bank, over objection of the Petitioners, introduced a *copy* of a purported telegram of July 21, 1949,

allegedly from Mann from Atlantic City to PAC authorizing PAC to pledge the Sherwood stock as *additional* collateral security with Peoples Bank. The evidence showed that Mann was not even in Atlantic City on the day the telegram was sent but was in Westminster, Maryland, on that day. Apparently Collom sent the telegram to himself or had one of his confederates do that from Atlantic City. Under these circumstances, it was quite important that the original telegram showing the handwriting of the person sending it be produced.

In any event, under the law as established by the Court of Appeals of Maryland, a copy of a telegram is not admissible in evidence, as *the best evidence is the original telegram itself*. This is clearly established by the Court of Appeals of Maryland in the case of *Smith v. Easton*, 54 Md. 138 (1880), and has been the Maryland law since that time. The District Court nevertheless admitted the evidence and declined to strike it out on motion by the Petitioners. The Court of Appeals, although the point was raised and argued, did not consider the question at all in either of its Opinions. The affirmance of the Judgment of the District Court, however, necessarily holds that the action of the District Court in admitting the copy of the telegram was proper. The admission of this copy was most prejudicial to the Petitioners, was entirely contrary to the decisions of the Court of Appeals of Maryland and should be reversed by this Court.

III.

It having been established that the title of PAC to the note was defective, pursuant to Sec. 55 of the Uniform Negotiable Instruments Act, the District Court should have instructed the jury to that effect and that the burden of proof was upon Peoples Bank to prove that it acquired title as a holder in due course, pursuant to Sec. 59 of the Act.

(Specifications of Error No. 5)

The District Court left it to the jury to find whether or not PAC's title was defective and instructed the jury in substance that if it found that the title were defective then Peoples Bank had the burden of proving that it acquired title as a holder in due course. The Court of Appeals stated that the District Court should have directed the verdict for the Plaintiff but held that this action by the District Court was correct.

Sec. 55 of the Uniform Negotiable Instruments Act provides as follows:

> "When Title Defective. The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto by *fraud*, duress or force and fear, or any unlawful means, or for an illegal consideration, or *when he negotiates it in breach of faith, or under such circumstances as amounts to a fraud.*" (Emphasis supplied.)

The evidence in the case shows beyond doubt that the entire transaction by Collom was a fraud. The evidence establishes:

1. That neither Sherwood nor Mann at any time authorized Collom to make an $800,000.00 loan or to pledge the Sherwood stock or the unissued duplicate Warehouse Receipts in Collom's hands as Trustee for such a loan.

2. Neither Sherwood nor Mann received any part of the proceeds of the loan.

3. Mann cancelled the unissued duplicate Warehouse Receipts shortly after the contract of June 10, 1949, was not consummated.

4. Sherwood and Mann continued to treat the original Warehouse Receipts as the only outstanding Receipts; Sherwood paid $76,256.50 and $118,000.00 subsequent to July 21, 1949, for loans secured by the original outstanding Receipts.

5. The statements submitted by PAC in the regular course of business do not show any $800,000.00 loan or $694,600.00 loan, but on the contrary showed that Sherwood was *indebted* to PAC in the amount of the outstanding original obligations. This is confirmed by the report to the auditors also.

6. At no time did the outstanding bona fide obligations amount to $800,000.00; the largest amount at any time was $497,697.27.

7. There would be no possible connection between the proposed sale for $2,000,000.00 cash and any loan as the contract of June 10, 1949, provided for the method of taking up the original obligations and outstanding original Receipts from the $2,000,000.00 purchase price before the issuance and delivery of the duplicate Receipts.

8. The testimony of Collom indicated that he had never discussed the $800,000.00 loan with Mann; that he received the entire proceeds for his own purposes, one of which was to pay a $300,000.00 overdraft with Fidelity-Philadelphia.

These facts clearly indicate that PAC's title was defective as stated in Sec. 55 of the Uniform Negotiable Instru-

ments Act. The District Court, therefore, should have instructed the jury to that effect and have instructed the jury, pursuant to Sec. 59 of the Uniform Negotiable Instruments Act, that the burden was upon Peoples Bank to prove that it acquired title as a holder in due course. The refusal of the District Court to thus instruct the jury was erroneous and prejudicial. *Wilson v. Kelso*, 115 Md. 162 (1911); *Stouffer v. Alford*, 114 Md. 110 (1910).

IV.

The District Court should have directed the verdict for Sherwood and Mann, as Peoples Bank had either actual knowledge of Collom's lack of authority or was put upon inquiry so that it, having failed to make inquiry which would establish the lack of authority, Peoples Bank was guilty of bad faith as a matter of law.

(Specifications of Errors Nos. 6 and 7)

A. *Peoples Bank knew that Collom was acting as Special Agent for the sale of the stock and whiskey inventory.*

Mr. Downie, President of Peoples Bank, admitted that during June, 1949, he knew that the purchase price for the Sherwood stock and whiskey inventory was $2,000,000,00. He knew and Dupuis knew that Collom was acting in this particular transaction as a *special selling agent* and not in his usual capacity as a loan broker to obtain operational loans of small amounts for Sherwood. Once that fact is established — and in this case, it is established by the Peoples Bank itself — it follows that the person dealing with the special agent must ascertain at his peril the limits of the authority of that agent. The power to sell does not give the power to pledge. The two transactions are essentially different in character. Peoples Bank had no right to

assume that Collom had the power to pledge when it knew he was acting as a special agent for selling. It is well established that when there is a disclosed principal and a third person knows that an agency relationship exists for a particular purpose, it is incumbent upon the third person to ascertain what the limitations are upon the authority of that agent.

Pasco County Peach Assn. v. Solley, 146 F. 2d 880 (CCA 4);
Jones v. Bankers Life Ins. Co., 131 F. 2d 989 (CCA 4);
Mass. Mutual Life Ins. Co. v. National Bank of Commerce, 95 F. 2d 797, 118 A. L. R. 1065 (CCA 4);
Equitable Life Assurance Soc. v. Poe, 53 Md. 28 (1880);
Schenker v. Indemnity Ins. Co. of N. A., 340 Pa. 81, 16 A. 2d 304, (1940 S. Ct. of Pa., — Patterson, J.).

See also:

Paper Mill Supply Co. v. Container Corp. of America, 301 Pa. 62, 151 A. 588 (S. Ct. of Pa. — 1930);
Daniels on "Negotiable Instruments, 7th Ed. (1933); Sec. 309, Pages 382-383; Sec. 313, Page 385; Sec. 328, Page 399.

It is equally well established that the power to sell does not imply or include the power to pledge or mortgage.

Allen v. St. Louis Nat'l Bank, 120 U. S. 20, 30 L. Ed. 573 (1887 — Gray, J.);
Taliaferro v. Baltimore First Nat'l Bank, 71 Md. 200;
Merchants Bank v. Livingston, 74 N. Y. 223;
Mott v. Koldes, 228 Pa. 264, 135 A. 764 (1927 — S. Ct. of Pa. — Moschzisker, C.J.).

The Court of Appeals for the Fourth Circuit in its second, or *per curiam*, opinion, states "There is nothing inconsist-

ent, however, between the authority to sell and the authority to pledge pending the consummation of sale." 194 F. 2d 387, at 388 (R-AE. 107). It cites no authority for this new legal concept. There is no such authority; the authorities are to the contrary. See the cases, supra, and also Mechem on Agency, 2nd Ed., Vol. 1, Sec. 897, where the learned author states:

> "An authority to sell goods clearly contemplates an actual transfer of the general ownership; and as has been seen, a transfer of such ownership for cash only. Mere authority to sell, therefore, does not justify a pledge even on the principal's account and a fortiori on the agent's account."

B. *Peoples Bank knew, or was charged with notice, that the purported Warehouse Receipts, all dated June 14, 1949, were "duplicate" Receipts.*

Peoples Bank seeks to avoid being charged with knowledge that all of the "duplicate" Warehouse Receipts were dated the same date, June 14, 1949, because in the safekeeping receipt issued by its agent, Fidelity-Philadelphia, the date was omitted.

There is no doubt, however, that Fidelity-Philadelphia was acting not only as *custodian* of the "duplicate" Warehouse Receipts of June 14, 1949, but it was acting generally for Peoples Bank in regard to the purported collateral and the payment of the notes. Fidelity-Philadelphia had custody of the duplicate Warehouse Receipts and had notice of the fact that they were all dated the same day. This, of necessity, is within the scope of the employment of the custodian of the Receipts. See *Manson v. Simplot*, 119 Iowa 74, 93 N. W. 75 (S. Ct. of Iowa — 1903).

In addition to being custodian, Fidelity-Philadelphia actually effectuated the transfer of the funds for Peoples Bank to PAC. When payments were made on acount of the pur-

ported $800,000.00 loan, certain duplicate Warehouse Receipts were withdrawn and delivered by Fidelity-Philadelphia to PAC. In other words, the power of substitution and withdrawal of collateral for Peoples Bank was in the hands of Fidelity-Philadelphia. Peoples Bank sent the $800,000.00 note for collection to Fidelity-Philadelphia. Fidelity-Philadelphia sent the note and collateral to the Manufacturers Trust Company by special messenger for Peoples Bank. Fidelity-Philadelphia acted for Peoples Bank in connection with the purported renewal note. The officials of Fidelity-Philadelphia acted on instructions of Peoples Bank. Under these circumstances, it seems clear that Peoples Bank is charged with whatever knowledge Fidelity-Philadelphia had in the scope of its employment.

Evans v. Metropolitan Life Ins. Co., 294 Pa. 406, 144 A. 294 (S. Ct. of Pa. — 1928);
Thistle Mills Co. v. Bone, 92 Md. 47, 48 A. 37 (Ct. of App. of Md. — 1900);
Devries v. Shumate, 53 Md. 211 (Ct. of App. of Md. — 1880).

See also:

Curtis, Collins & Holbrook Co. v. U. S., 262 U. S. 215, 43 S. Ct. 570, 67 L. Ed. 956.

The Court of Appeals for the Fourth Circuit, in its Second (Per Curiam) Opinion, does mention the fact that the duplicate Warehouse Receipts all had the same date but fails to perceive the importance of that fact in charging Peoples Bank with notice of the fraud or, at least, with putting it upon inquiry to discover the limits of Collom's authority. It must be kept in mind that Peoples Bank had five bona fide loans aggregating approximately $144,000.00 which were secured by bona fide original Warehouse Receipts. The officials of Peoples Bank testified that they understood that the $800,000.00 loan was being made to take up the

original bona fide loans and Warehouse Receipts and the money was to be used for that specific purpose. Collom requested originally a $700,000.00 loan on July 20, 1949, for this specific purpose. This was increased overnight by him by an additional $100,000.00, to $800,000.00. June 14, 1949, is *more than a month prior* to July 20, 1949, when the amount of the purported loan was finally determined. It was also a month prior to July 21, 1949, when the purported $800,000.00 loan to Sherwood was authorized by the Executive Committee of Peoples Bank. It is obvious, therefore, that these purported Warehouse Receipts which were received as collateral security by Peoples Bank must, *of necessity*, have duplicated all of the outstanding original and bona fide Warehouse Receipts as of June 14, 1949, because the purported $800,000.00 loan was allegedly to be used for the purpose of taking up and paying the outstanding loans in the hands of the smaller banks, as well as $144,000.00 of loans to Peoples Bank itself. If the outstanding bona fide loans had already been paid on June 14, 1949, then, of course, the $800,000.00 loan, even on Peoples Bank's own theory, would not have been justified. Peoples Bank, however, *knew* that the original loans had not been paid as it had $144,000.00 of the outstanding original loans itself. The fact that duplicate Receipts for over 21,000 barrels of whiskey had been issued on *one day* is sufficient in itself to put Peoples Bank upon inquiry in regard to the true situation (a) because of the obvious duplication and (b) because, as Mr. Winchester, Vice-President of the Union Trust Company, testified, the fact that over 21,000 barrels on Warehouse Receipts, all bearing one date, is such an extraordinary situation as to require investigation (R. 209).

If the transaction were really as Peoples Bank states it understood, then the duplicate Warehouse Receipts would

all have been dated July 21, 1949 or some date shortly before that, but not over a month before, on June 14, 1949.

It should also be kept in mind that the notes for $144,000.00 loans also had the serial numbers of the barrels of whiskey on them, and these notes were in the hands of Peoples Bank until July 25, 1949, so that it had both the safekeeping receipt and the notes in its hands for three days which showed that the serial numbers of the whiskey were duplicated. This fact alone was sufficient to put Peoples Bank upon inquiry as to Collom's authority. A simple telephone call or a letter would have disclosed the entire fraud if any inquiry at all had been made.

C. *Peoples Bank Admits that it Knew that the Purported Loan was for a Particular and Limited Purpose Only but Failed to see to it that the Proceeds of the Loan Were Devoted to that Purpose.*

Peoples Bank was under an obligation, (1) to ascertain what the amount of the outstanding loans was and (2) to see to it that the money was devoted to that purpose. It was under the obligation to do this for the protection of Sherwood, and it was under the obligation to do this for its own protection, as it knew that there could not be two valid outstanding Warehouse Receipts upon the same whiskey at the same time. In its second, or *per curiam*, opinion, the Court of Appeals indicates that "Plaintiff may have been negligent" in this regard. 194 F. 2d 387, 388 (R-AE. 106).

A fact which should have put Peoples Bank on inquiry in this connection was the overnight request by Collom to Dupuis to increase the loan by $100,000.00. Dupuis as a banker, must have known that if the proceeds of the loan were to be used to take up the outstanding smaller loans, a "small loan" of $100,000.00 (which would be more than

twice the amount of any former "small" loan) would never have been negotiated *the day before* the purported consolidating loan was to be executed.

D. *Peoples Bank Knew, or is Charged with Notice, that Collom was Using the Money for his Own Purpose and not for Sherwood.*

All of the proceeds were transferred by Peoples Bank to PAC. Sherwood got none of the proceeds. Immediately upon the receipt of the proceeds, approximately $300,000.00 was used by PAC to cover overdrafts of checks of PAC drawn on Fidelity-Philadelphia then outstanding. In other words, immediately upon receipt of the money by PAC, not Sherwood, approximately 35% of the entire fund was used for the individual purposes of PAC, or Collom, in the bank account of PAC in Fidelity-Philadelphia. Knowledge of these facts by Fidelity-Philadelphia is clearly attributable to Peoples Bank.

National Bank of Shamokin v. Waynesboro Knitting Co., 314 Pa. 365, 172 A. 131 (S. Ct. of Pa. — 1934);

First National Bank v. Cattie Bros. Corp., 285 Pa. 202, 131 A. 731 (S. Ct. of Pa. — 1926);

Munn v. Boasberg, 292 N. Y. 5, 53 N. E. 2d 371 (Ct. App. of N. Y. — 1943);

Ward v. City Trust Co. of N. Y., 192 N. Y. 61, 84 N. E. 585;

Alton Banking & Trust Co. v. Alton Bldg. & Loan Assn., 289 Ill. App. 177, 6 N. E. 2d 921, (App. Ct. of Ill. — 1937);

See also:

State Bank of Binghamton v. Backe, 293 N. Y. S. 667.

The above facts and authorities establish that Peoples Bank was guilty of bad faith as a matter of law, and the verdict should have been directed for Sherwood and Mann.

IV.

The failure of the trial judge to instruct the jury in regard to the factual elements from which the jury could find bad faith on the part of Peoples Bank, and the trial judge's failure to instruct the jury that delay in attempting to collect the purported notes was evidence of a want of a valid claim by Peoples Bank, as requested by the Petitioners in their sixteenth and fifteen requests for instructions and which the district judge indicated he would instruct the jury but in the charge failed to do so, resulted in error prejudicial to the Petitioners.

(Specifications of Errors Nos. 8 and 9)

The Sixteenth and Fifteenth Requests for Instructions by the Petitioners appear at R. 318-319. After substantial argument, the District Judge, prior to the argument to the jury by Counsel, indicated that he would instruct the jury substantially as outlined in those two Instructions (R. 289). Counsel for the Petitioners quite naturally strongly argued to the jury in accordance with the Instructions which the District Judge indicated he would give and emphasized with the jury that the District Judge would Charge as he had previously indicated. In the Charge, however, the District Judge did not Charge the jury as he had indicated the day before. This is contrary to Rule 51 of the Federal Rules of Civil Procedure and inevitably greatly prejudiced the Petitioners with the jury. It is not difficult to see the practical, as well as the theoretical, injury which results in the trial of a case where Counsel advises the jury that the Court will instruct the jury in a certain way, only to have the Court instruct the jury in a different way or have the Court fail to instruct the jury as Counsel has emphasized in his argument to the jury. It is not too much to say

that this factor may well have been the cause of the jury's verdict for the Plaintiff.

This is a most important matter in the trial of jury cases in the Federal Court. It is quite essential that if the District Judge is to Charge the jury *after* the argument of Counsel, that the District Judge adhere strictly to the rulings given Counsel in regard to the form and substance of the Charge prior to argument. This error requires that the supervisory power of this Court be exercised and the error corrected in the interest of due process of law and the proper trial of jury cases.

The Sixteenth Request for Instructions properly presented the applicable law, as willful disregard of known facts showing a want of title or willful evasion of the knowledge of facts amounts to bad faith within the meaning of the Negotiable Instruments Law. The failure to investigate suspicious circumstances may constitute bad faith. *Morris v. Muir,* 181 N. Y. S. 913; *Iowa National Bank v. Carter,* 144 Iowa 715, 123 N. W. 237. See also *Sample v. Hundred Lakes Corporation,* 107 Fla. 568, 145 S. 193; *Friedman v. Short,* 201 Ark. 723, 147 S. W. 2d 11; *Farmers & Merchants Bank v. Germania Life Ins. Co.,* 150 N. C. 770, 64 S. E. 902; *Moore v. Potomac Svgs. Bank,* 160 Va. 597, 169 S. E. 922; *Silver Discount Corp. v. Blair,* 106 Vt. 11, 168 A. 917; *Soma v. Handrulis,* 277 N. Y. 223, 14 N. E. 2d 46, 50; *Twitchell v. Nelson,* 131 Minn. 375, 155 N. W. 621, 624.

The Fifteenth Instruction in regard to delay is also in accordance with the applicable law. *Sacks v. Scheiman,* 105 Conn. 73, 134 A. 240.

V.

The Court of Appeals erred in holding that the doctrine of "two innocent persons" applied in the case at bar notwithstanding Sec. 14 of the Uniform Negotiable Instruments Act.

(Specifications of Error No. 10)

In its first Opinion, the Court of Appeals substantially predicates its affirmance of the District Court's Judgment on the Common Law Doctrine that "where two innocent persons must suffer for the wrongful act of a third party, he who has put it within the power of the third person to commit the wrong must suffer the loss". The Court of Appeals suggests that this doctrine was incorporated in toto into the Negotiable Instruments Law by virtue of Sec. 14 of the Uniform Act. This, however, is not the case. The Court overlooks the substantial change in the Common Law Rule effected by Sec. 14 of the Uniform Act. This change in regard to the filling out of blanks in instruments is as follows:

> "In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, *is negotiated to a holder in due course*, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time." (Emphasis supplied.)

As pointed out by the Supreme Court of Appeals of Virginia, "This was a very important change in the common law on this subject, and very far-reaching in its effect." *Brown v. Thomas*, 120 Va. 763, 92 S. E. 977. See also *Cinema Circuit Corporation v. Merrill Amusement Corporation*, 121 N. J. L. 216, 2 A. 2d 43, *Leonard v. Saccard*, 13 N. Y. S. 2d 688, *Cache Valley Commerce Corporation v. Genter Sales Co.*, 63 Utah, 574, 228 P. 203.

The law is well established that the filling in of a note for a larger amount than that authorized is a defense against the note in the hands of any person other than a holder in due course. *Marion Savings Bank v. Leahy*, 200 Iowa 220, 204 N. W. 456; *Hannen v. Peoples State Bank*, 195 Ky. 58, 241, S. W. 355; *Massey v. Massey*, 267 Pa. St. 239, 110 A. 341; *Miles City Bank v. Askin*, 119 Mont. 581; 179 P. 2d 750, 171 A. L. R. 790. *Vander Ploeg v. Van Zuuk*, 135 Iowa 350, 124 Am. St. Rep. 275, 13 L. R. A. n.s. 490.

There is, of course, no doubt whatever that Collom did not fill up the blanks in either of the purported notes in accordance with any authority from Sherwood or Mann, and on no theory would Collom be authorized to fill in a note for $800,000.00 as all of the outstanding valid obligations at no time exceeded the sum of $497,697.27. The case at bar is undoubtedly controlled by the Negotiable Instruments Law so that it is vitally important whether or not the purported $800,000.00 note was *negotiated to Peoples Bank as a holder in due course.*

The decision of the Court of Appeals to the contrary is in error and should be reversed (2).

VI.

The Court of Appeals erred in holding that the $800,000.00 note was "negotiated" to Peoples Bank.

(Specifications of Error No. 11)

As heretofore pointed out in this Brief, the purported $800,000.00 loan was a direct loan from Peoples Bank to Sherwood with PAC and Mann as accommodation endorsers. It was not a rediscounted operational loan of $40,-

(2) It should be pointed out that the Court of Appeals relied principally upon the case of *Bank of Pittsburgh v. Neal*, 22 How. 96, 16 L. Ed. 323, decided by this Court on May 12, 1860, some 37 years before the Uniform Negotiable Instrument Act was adopted by any jurisdiction, and before the change made in the Common Law by Sec. 14 of the Uniform Act (R-AE. 80-81). The Court of Appeals also relied on the case of *Gronvold v. Federal Union Security Co.*, 212 F. 908, involving a *Bond of Indemnity* issued in blank (R-AE. 82).

000.00 or $45,000.00, but was a purported loan of $800,000.00 or approximately 20 times larger than the largest operational rediscounted loan. There was no "rediscounting" as the full rate of 6% was charged. The Court of Appeals is apparently laboring under the impression that because the bank "discounted" the three months interest at 6% that the loan was a "rediscount". This is not the case, as a discount of interest occurs in substantially all time paper whether a direct loan or otherwise.

Under all of the circumstances of the case, it cannot be said that the note was "negotiated" within the meaning of the Negotiable Instrument Law. The holding of the Court of Appeals for the Fourth Circuit to the contrary is in conflict of the decision of the Court of Appeals for the District of Columbia in the case of *Washington Loan & Trust Co. v. Cowgill*, 85 F. 2d 255 (1936 — Martin, C. J.).

This conflict should be resolved by this Court, and the decision of the Court of Appeals for the District of Columbia approved.

VII.

The Court of Appeals erred in stating that the District Court should have directed a verdict for the plaintiff, Peoples Bank.

(Specifications of Error No. 12)

The statement by the Court of Appeals that the Trial Court should have directed a verdict for the Plaintiff is extraordinary in view of the decision of that Court in the case of *Commercial Trust Company of New Jersey v. Kealey*, 92 F. 2d 397 (Soper, Ct. J., Parker, Ct. J., dissenting). In the *Kealey* case, the Court of Appeals properly held that where it was shown that the title of any person who negotiated the instrument was defective, the burden

of proof was upon the holder to prove that he acquired the title as a holder in due course, as provided in Section 59 of the Uniform Negotiable Instruments Act.

In the case at bar, the same principle applied and in view of the facts, it would have been extraordinary indeed to have directed a verdict for Peoples Bank, which had the burden of proving the absence of bad faith. The jury might well have disbelieved all of the Peoples Bank's testimony, and the Bank, having the burden of proof, could not, under those circumstances, have had a verdict in its favor.

In the case at bar, the District Court submitted the case to the jury under erroneous instructions. It is important, however, on the question of the prejudice of those erroneous instructions to correct the statement of the Court of Appeals that the Trial Court should have directed a verdict for the Peoples Bank.

VIII.

The Court of Appeals erred in approving the charge of the District Court that in order to find Peoples Bank guilty of bad faith, its conduct must be "substantially equivalent to fraud and the jury must decide that the "plaintiff bank was dishonest, namely, did it let PAC have the money on the note, knowing or believing that PAC did not have authority to negotiate the note, or that PAC would use its proceeds, or some of its proceeds, for PAC's own purposes * * *" (R. 306).

(Specifications of Error No. 13)

This test, which is substantially adopted by the Court of Appeals, although in the Second, or *per curiam*, Opinion the Court admits that Peoples Bank was negligent, is too stringent and harsh a test for the finding of bad faith. If this were the test, there would never be a civil action in

which a bank were found possessed of bad faith without a corresponding criminal action for conspiracy or obtaining money under false pretenses. The Negotiable Instrument Act is a civil, not a criminal, statute. The practical effect of such a test would be to make it substantially impossible ever to challenge a note obtained or passed by fraud in the hands of any holder. The authorities do not sustain this position of the District Court and of the Court of Appeals.

A case closely in point is *Barre Trust Co. v. Ladd*, 103 Vt. 392, 154 A. 680, 689 (1931).

See also:

Fehr v. Campbell, 288 Pa. 549, 137 A. 113, 52 A. L. R. 506 (1927 — Moschzisker, C. J.);
National Bank of Shamokin v. Waynesboro Knitting Co., 314 Pa. 365, 172 A. 131 (1937);
Valley Savings Bank v. Mercer, 97 Md. 458, 55 A. 435;
Commercial Trust Co. v. Kealey, supra.

These authorities clearly show that the Trial Court's instruction was clearly erroneous, and much too favorable to Peoples Bank. It was quite prejudicial and requires a reversal.

IX.

The Court of Appeals erred in approving the ruling of the District Court in permitting secondary evidence in regard to the signatures upon, and the terms of, the purported $800,000.00 note without a proper foundation having been laid by showing a proper search for the original purported $800,000.00 note.

(Specifications of Error No. 14)

The evidence of the Peoples Bank failed to establish that the purported $800,000.00 note was either lost or destroyed.

Under the Pleadings, the purported consideration for the renewal note of October 19, 1949, was the purported $800,000.00 note of July 21, 1949.

The burden of proof was upon Peoples Bank to produce either the original $800,000.00 note, which is probably still outstanding and in the hands of someone other than Sherwood, or to establish its loss or destruction and then offer any available evidence of a copy of that note, or if no copy is available, then the terms of the note by someone familiar with those terms.

The Peoples Bank failed to meet this burden. It proved through its witness, Altemose, of Fidelity-Philadelphia, that the original $800,000.00 note had been returned to PAC. It then proved through its witness Collom that when Collom left the offices of PAC the original $800,000.00 note was in the files of that office. This was in August, 1950, after the entire situation was known to everyone. The Peoples Bank attempted to prove at the taking of the Collom deposition, by a statement by counsel for the trustee in bankruptcy of PAC that he had caused a search of the office files to be made but had been unable to find the original note, although a copy of the $694,600.00 note of October 19, 1949, was discovered in the files. No attempt was made by Peoples Bank either at the deposition or at the trial to produce the persons actually making the search, nor was any attempt made to examine the office employees of PAC in regard to the matter. It therefore is not disclosed from the Record (1) who made the search; (2) how thorough a search was made; (3) who had charge of the books and records of PAC subsequent to the day Collom left the office and prior to the taking of possession by the trustee in bankruptcy. The Peoples Bank, therefore, failed to lay a proper foundation for the introduction of any secondary

evidence to establish either the validity of the signatures on the $800,000.00 note (which has never been admitted by Sherwood and Mann), or what the provisions of the $800,000.00 note were.

Glenn v. Rogers, 3 Md. 312 (1852 — Tuck, J.); *Bartlett v. Wilbur,* 53 Md. 485 (1880 — Robinson, J.).

This is an important consideration, as the law is established that if the holder of a renewal note was not a holder in due course of the original note, then the renewal note is subject to the same infirmities as the original note. *Grace Company v. Strickland,* 188 N. C. 369; 124 S. E. 856; 35 A. L. R. 1296.

The District Court, however, over the objection of Sherwood and Mann, permitted Dupuis to testify in regard to the signatures upon and the terms of the purported $800,000.00 note (R. 41, 254-256). This ruling was clearly erroneous, was quite prejudicial to the Petitioners and requires a reversal.

X.

The Court of Appeals erred in holding that the District Court acted properly in approving a change made by the clerk on the docket subsequent to the recordation of the general verdict and judgment by inserting the words "the Sherwood Distilling Company and Louis Mann" and by changing the word "June" to "July" after the jury had been polled and discharged.

(Specifications of Error No. 15)

The Trial Court charged the jury in regard to the Union Trust Company of Maryland, as follows: "But that company insofar as this suit is concerned has had its differ-

ences with the Plaintiff adjusted, or they are in the course of adjustment; and you need not pay any attention to the fact that that company nominally appears on the original pleadings that you have" (R. 360).

The Trial Court should have either dismissed the action as to the Union Trust Company of Maryland prior to the impaneling of the jury or after the jury was impaneled, to have directed the jury to find a verdict for the Union Trust Company of Maryland. The Trial Court, however, did neither, and the jury brought in a verdict generally for the Plaintiff and assessed the damages at $694,600.00, plus interest at 6% to date. The jury did not calculate the interest and add it to the principal sum and render a lump sum verdict in accordance with the usual practice. Counsel for Sherwood and Mann asked that the jury be polled, and each of them agreed that the verdict announced by the foreman was their verdict. When the jury hearkened to its verdict, however, the verdict was again for the Plaintiff generally, and in the amount of $694,000.00 — $600.00 less than the foreman had announced, "plus interest at 6% to date" (R. 313). The Clerk announced that the verdict was thus recorded.

The Court then stated to the foreman: "The instructions were that any interest allowed would be from June 25, 1950 to this date. Is it within the instructions?" The foreman: "Yes, Your Honor." The Court: "It is within the dates?" The foreman: "Yes, Your Honor." The Court: "Is that the interest to which you referred?" The foreman: "Yes, sir" (R. 313).

In fact, the Court had instructed the jury that if it found for the Peoples Bank and allowed interest, the interest should run from *July* 25, 1950 down to date (R. 308).

The Clerk, in recording the original verdict and judgment recorded it in favor of the Plaintiff against the Defendant for $694,600.00 plus interest at 6% from June 25, 1950. Later the Clerk inserted the words, "The Sherwood Distilling Company and Louis Mann", which action was approved by the Court, and struck out the word "June" and inserted the word "July", pursuant to the directions of the Trial Judge (R. 336-337).

The law is well established that if there are several Defendants and there is a general verdict in favor of the Plaintiff, the verdict and the judgment entered thereon runs against all the Defendants. *Winans v. Christy*, 4 Cal. 70, 60 Am. Dec. 597 (S. Ct. of Cal. 1854); *Lewis v. Gove County Tel. Co.*, 95 Kan. 136, 147 P. 1122 (S. Ct. of Kan. 1915); see also 53 *Am. Jur.*, No. 1040, p. 720. This was understood by the Clerk of the District Court who originally entered up the verdict and judgment against the Defendants generally. Later this verdict and judgment was restricted to two Defendants of the original three, and that action was approved by the District Judge.

The jury at no time fixed the beginning date and the running of interest at July 25, 1950, as appears in the present record of the verdict and judgment. Under the guidance of the District Judge, at the end of the case, *after* the jury was polled and had hearkened to its verdict, the foreman adopted the Court's suggestion of *June* 25, 1950. This was contrary to earlier instructions of the Court, and interest could not possibly have begun on this date as the purported note for $694,600.00 was not protested until July 25, 1950.

This entire course of conduct by the jury shows that it was confused by the Trial Court's instructions.

It is submitted that the District Court had no right to (a) restrict the scope of the verdict and judgment and (b) change the beginning date for the running of interest.

Anderson v. Aetna Cas. & S. Co., 175 S. C. 254, 178 S. E. 819 (S. Ct. S. C., 1934);
Smith v. Phoenix Indem. Co., 119 N. J. L. 522, 197 A. 15 (Ct. of E. & Ap. N. J., 1938);
Minot v. Boston, 201 Mass. 10, 86 N. E. 783 (S. J. Ct. of Mass., 1909).

See also:

53 *Am. Jur.*, No. 1094, p. 758.

CONCLUSION

For the reasons and upon the authorities above set forth, this Court should grant the Petition for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit and reverse the Judgment of the Court of Appeals in this case and require the Respondent, Peoples Bank, to pay the costs.

Respectfully submitted,

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ADDENDUM

Pertinent provisions of the Uniform Negotiable Instruments Act.

"Sec. 14. Blanks; When May Be Filled. — Where an instrument is wanting in any material particular, the person in possession thereof has a prima facie authority to complete it by filling up the blanks therein. And a signature on a blank paper delivered by the person making the signature in order that the paper may be converted into a negotiable instrument operates as a prima facie authority to fill it up as such for any amount. In order, however, that any such instrument when completed may be enforced against any person who became a party thereto prior to its completion, it must be filled up strictly in accordance with the authority given and within a reasonable time. But if any such instrument, after completion, is negotiated to a holder in due course, it is valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up strictly in accordance with the authority given and within a reasonable time."

Annotated Code of Maryland, Art. 13, Sec. 33;
Purdon's Pennsylvania Statutes, Title 56, Sec. 16.

"Sec. 55. When Title Defective. — The title of a person who negotiates an instrument is defective within the meaning of this act when he obtained the instrument, or any signature thereto, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud."

Annotated Code of Maryland, Art. 13, Sec. 74;
Purdon's Pennsylvania Statutes, Title 56, Sec. 135.

"Sec. 59. Who Deemed Holder in Due Course. — Every holder is deemed prima facie to be a holder in due course;

but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

Annotated Code of Maryland, Art. 13, Sec. 78;
Purdon's Pennsylvania Statutes, Title 56, Sec. 139.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. [redacted] 69

THE SHERWOOD DISTILLING COMPANY, A CORPORATION, AND LOUIS MANN,
Petitioners,

VS.

PEOPLES FIRST NATIONAL BANK AND TRUST COMPANY, A CORPORATION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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THE SHERWOOD DISTILLING COMPANY, A CORPORATION, AND LOUIS MANN,
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VS.

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Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

Respondent for convenience will follow the designation used by Petitioners for reference to the litigants and other persons involved, and for reference to the record.

Respondent cannot accept, in many particulars, the Petitioners' "Statement of the Matter Involved" beginning at page 2 of the Petition. So far as necessary to decide the limited issue of the propriety of allowing a writ, we believe the facts are amply and accurately set forth in the

opinion of the Court of Appeals, (R.-AE, 76; 193 F. 2d 649, 650-652.)

It will be noted that Petitioners' brief throughout attempts once more to argue the facts, which were fully presented to the jury in a lengthy trial, under a full and comprehensive charge by the District Judge (R. I, 297-310), and all conflicts in testimony were resolved against the Petitioners by the verdict.

ARGUMENT

Petitioners' Purported Reasons for a Writ

While the case is important to the parties because of the substantial sum of money involved, there is no vestige of "special and important" reasons, from the standpoint of judicial precedent, why this Court should be burdened with the hearing of this case.

We will consider briefly the Petitioners' "Reasons for the Allowance of the Writ", which ingeniously attempt to squeeze the adverse result into the language of Rule 38(5).

Reason I. "The Court of Appeals for the Fourth Circuit has rendered a decision in conflict with the decisions of other Circuit Courts of Appeals in the same matter".

Point A discusses the testimony as to the nature of the original loan, that is, whether it was a direct loan to Sherwood, or the acquisition of Sherwood's note through P.A.C. Neither the District Court's charge, nor the decision of the Court of Appeals, held "as a matter of law" that oral testimony *superseded* the Bank's committees minutes. The basic inquiry of fact was, of course, what actually happened, which, from all the testimony, was clear enough to everyone, including the jury. The cases cited by Petitioners at page 19 of the Petition have no bearing on this situation.

The preliminary minutes of the Bank's committees did not constitute any form of obligation, nor were the minutes even a recording of legal prerequisites to the loan as between the parties. The parole evidence rule is not involved, as it clearly was in the cited cases. (The case of *Duffy v. Treide*, 75 F. 2d 17, is erroneously cited as 175 F. 2d 17.) Furthermore, the Bank's own ledger, which is its operating record, accurately reflects the transaction (R. II, 33-34).

Point B. We do not find any basis for the statement that the Court of Appeals "held" that the original note was negotiated even though Peoples Bank be considered the payee. We do not understand this point.

Reason II. "The Court of Appeals for the Fourth Circuit has decided important questions of local law in a way to conflict with applicable local decisions."

Under this "Reason", Petitioners complain of the admission of secondary evidence. They cite Maryland decisions of 1852 and 1880, but overlook the case of *Barranco v. Kostens*, 189 Md. 94, 54 A. 2d 326, decided in 1947, wherein the Maryland Court of Appeals says:

> "The question whether the search for a lost instrument has been sufficient to render secondary evidence of its contents admissible is addressed to the sound discretion of the court, and the determination of the question is not reviewable on appeal unless there has been a manifest abuse of discretion."

Reason III. "The Court of Appeals for the Fourth Circuit has misconstrued and misapplied several important provisions of the Uniform Negotiable Instruments Act."

We believe that a careful reading of Judge Parker's opinion will not sustain this wholesale rebuke.

As to Point A, Respondents overlook, though the Court of Appeals did not, the distinction in Section 14 of the Uniform Negotiable Instruments Act, between the rights of parties prior to and after completion of the paper.

As to Point B, the District Court's instructions were clear, and in any event it is obvious that the jury found that Peoples Bank had no knowledge that the note was issued in blank. This is one of many examples of the attitude taken throughout by Respondents that their version of the transaction is still arguable fact, although the jury found flatly against them.

As to Point C, we think it is plain that the comment, in the opinion for the Court of Appeals, that the District Court could have directed a verdict for plaintiff Peoples Bank, was only a reflection in the mind of the Court of Appeals of the complete lack of merit in Petitioners' appeal. Respondent still feels that the District Court should have directed a verdict in its favor, for want of any evidence of lack of good faith. But the case was given to the jury, and its general verdict includes a finding of every material, necessary and issuable fact submitted to them in favor of the prevailing party. (See, e.g., *Erie Railroad Co. v. Schleenbacker*, 257 F. 667, C. C. A. 6, 1919.)

Point D deals with the District Court's charge on the question of bad faith. It suffices to repeat what the Court of Appeals said in its opinion (R.-AE, 86):

> "The trial judge correctly and sufficiently charged the law applicable in the case when he placed the burden of proof on plaintiff and defined bad faith substantially in the language of the decisions above referred to, telling the jury that negligence or failure to make inquiry was not enough."

Reason IV. "The Court of Appeals has sanctioned such a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision."

We suggest that under this "Reason" the Petitioners have descended to downright frivolity. As to Point A, the practise of arguing to the jury without full knowledge of the coming charge is a disadvantage to both sides in every case, but that objection, if valid, is addressable to the Rules of Civil Procedure.

Point B, as to the form of the jury's verdict, is certainly *de minimis.* What was done to correct the negligible error was the only sensible course, and fully within the trial court's duty.

Some Basic Evidence

Respondent—plaintiff's case did not depend on establishing express authority in Sherwood's agent P.A.C. to negotiate the notes and collateral for Sherwood. But such authority was express. Collom (head of P.A.C.) had discussed with Mann the desirability of consolidating the smaller loans then outstanding. On July 20, 1949, the day before the original note was negotiated, Mann wrote the following letter to P.A.C. (R. I, 136; R.-AE, 65a):

> "Gentlemen: Enclosed find the two notes referred to on the phone which will take care of replacements for the entire collateral held by all banks. When this is complete please forward me a copy. I am in hopes the additional insurance placed with Shackelford will be taken care of and in the event he cannot place it I will arrange to place it myself. If there is anything further, please let me hear from you."

In connection with this letter, Mann testified about his conversation with Collom (R. I, 137):

> "He told me he was arranging to refinance all loans held by the various small banks into one or two loans and at that time he asked me to send him two notes to cover the possibility of placing both of the loans. He also asked me to try and secure insurance to cover the loans for he intended to place the best part of it with the National Bank and Trust Company of Pittsburgh-Peoples."

Leaving aside all other testimony, this letter and this statement establish that Mann had authorized P.A.C. to negotiate a large loan with Peoples Bank.

CONCLUSION

We believe that it is clear on the face of the elaborate Petition and brief in support thereof, that not only is there no ground for granting a writ, but that the case was correctly decided by the jury, on a full and fair charge. We therefore respectfully urge this Honorable Court to deny the Petition.

Respectfully submitted,

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